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In the Supreme Court of the United States

OCTOBER TERM, 1992

GORDON E. POWELSON, AN INDIVIDUAL, AND CHICAGO TITLE INSURANCE COMPANY OF OREGON, AN OREGON CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

GORDON E. POWELSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF CLYDENA M. GROSS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether, in Ninth Circuit Case No. 89-35736, the court of appeals erred in not explicitly ruling on a quiet title claim when one petitioner (the Estate) did not seek such relief in its final amended complaint and the other petitioner (Powelson, in his individual capacity) failed to file a notice of appeal.

2. Whether, in Ninth Circuit Case No. 90-35005, the court of appeals (i) correctly rejected a request for declaratory relief because it was barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201, and (ii) correctly rejected a quiet title claim brought under 28 U.S.C. 2410 on the ground that the government had already sold the property when the suit was filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 979 F.2d 141. The opinions of the district court (Pet. App. B2-B18, V1-V9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1992. A petition for rehearing en banc was denied on December 8, 1992. The petition for a writ of certiorari was filed on January 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Estate of Clydena Gross filed an estate tax return but failed to pay the taxes reported to be due. On August 17, 1981, the Internal Revenue Service assessed the reported taxes, plus interest and penalties. At the time of the decedent's death, a federal lien to secure payment of the taxes owed by the Estate attached to all property belonging to the estate. See 26 U.S.C. 6324(a)(1).

The Organ Grinder restaurant, which was owned by the Estate, was thereafter distributed to petitioner Gordon Powelson (Gross's son) "subject to all taxes and liabilities" (Pet. App. B3-B4). On July 1, 1987, the Service levied upon the restaurant to collect the unpaid estate taxes. The Service sent Powelson, who was then in possession of the property, a Statement of Levy and Notice of Seizure (*id.* at B4).

On August 21, 1987, the Estate brought suit in federal district court (the First Suit). The Estate sought a declaratory judgment that the levy was void because the Service had failed to send the Estate a Notice of Intent to Levy (Pet. App. L1-L4). On February 5, 1988, the IRS sent the Estate a Notice of Intention to Levy and, on February 16, 1988, the IRS again levied on the property (*id.* at B5).

On March 23, 1988, two employees of the IRS went to Powelson's residence to serve him a Notice of Sale of the property. Unable to find him, they mailed him the notice by both regular and certified mail. Powelson received the notice on or about March 28, 1988. The Notice of Sale stated that the Organ Grinder restaurant had been seized for nonpayment of estate taxes, that the property would be sold under sealed bid, and that "[o]nly the right, title, and interest[] of the Estate of Clydena M. Gross, Gordon E. Powelson-Distributee" would be offered for sale (Pet. App. B6). The bids were opened on April 21, 1988, with Powelson in attendance. The property was sold to the Chicago Title Insurance Company for $400,000. This amount fully paid the taxes owed, plus all costs. The surplus of $93,186.48 was paid to the Estate (*id.* at B5-B6).

After the sale was concluded, the Estate filed an amended complaint which Powelson joined in his individual capacity. The amended complaint sought to vacate the administrative levy and sale (Pet. App. I1-I9). The district court dismissed the complaint. The court concluded that equitable relief was not appropriate because the Estate had an adequate remedy at law in a refund action under 26 U.S.C. 7422 (Pet. App. H1-H6).

2. The Estate thereafter filed an administrative refund claim, which was denied by the IRS (Pet. App. D7). The Estate and Powelson then sought leave to file a new amended complaint. The district court granted this motion only to the extent of allowing the Estate to file a suit for refund. Pursuant to this order, the Estate filed its final amended complaint seeking a refund of the estate taxes. The Estate did

not allege in its final amended complaint that it did not owe the taxes. Instead, the Estate alleged that the Notice of Sale was ineffective because it was served by mail and not in person (*id.* at D1-D11). Powelson sought no individual relief in this final amended complaint.

3. On May 11, 1989, Powelson (who was no longer a party to the First Suit) filed a separate action in his individual capacity as distributee, seeking a declaratory judgment and an order quieting title to the property (the Second Suit). An amended complaint in the Second Suit added the Chicago Title Insurance Company (the purchaser of the property) as an additional plaintiff. The plaintiffs in the Second Suit made the same allegations made by the Estate in the First Suit and also contended that the sale had taken place in the wrong county (Pet. App. N1-N20).

4. On September 21, 1989, the district court granted summary judgment to the government in the Estate's refund action (the First Suit), rejecting all of the Estate's claims on the merits (Pet. App. B2-B15). On October 12, 1989, the district court dismissed for lack of jurisdiction the Second Suit filed by Powelson and Chicago Title, holding (i) that the government had not waived its immunity to suit, (ii) that the suit did not fall within any exception to the Anti-Injunction Act, 26 U.S.C. 7421(a), and (iii) that the suit was barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201 (Pet. App. V3-V6). The court also rejected the quiet title claim because the property had been sold, the government no longer claimed a lien on the property, and therefore the waiver of sovereign immunity in 28 U.S.C.

2410 for quiet title actions involving property in which the government possesses a lien is not applicable in this case (Pet. App. V6-V9).

5. The Estate (but not Powelson in his individual capacity) filed a notice of appeal from the decision in the First Suit. In the Second Suit, both Powelson and Chicago Title appealed. The appeals were consolidated in the court of appeals.

Addressing the Estate's tax refund claim (the First Suit), the court of appeals agreed with petitioners that the IRS had failed to comply with the requirements for personal delivery of the notice of tax sale, as set forth in 26 U.S.C. 6335(a). Relying on *Goodwin* v. *United States*, 935 F.2d 1061, 1065 (9th Cir. 1991), the court held that Powelson's actual receipt of the notice did not satisfy the statute (Pet. App. A3-A5). The court remanded the case for the district court to determine whether this procedural error in the notice of sale would require the government to refund the taxes to the Estate.

With respect to the Second Suit brought by Powelson and Chicago Title, the court of appeals held that declaratory relief was precluded by the express terms of the Declaratory Judgment Act, which excludes from its coverage any dispute "with respect to federal taxes" (28 U.S.C. 2201). The court held that the quiet title action also could not be maintained because the property had been sold *before* petitioners brought their suit, the government no longer claimed a lien on the property and the suit thus did not fall within the limited waiver of sovereign immunity provided by 28 U.S.C. 2410 (Pet. App. A7-A8).

ARGUMENT

1. *The First Suit By The Estate*

a. The only relief sought in the final amended complaint filed in the First Suit was a federal tax refund. The court of appeals agreed with the Estate's contention that the notice of sale of the restaurant was delivered improperly to Powelson under 26 U.S.C. 6335(a).[1] The court did not, however, order a refund. Instead, it remanded for the district court to determine whether a refund was required in these circumstances.[2]

The Estate contends (Pet. 21-22) that the court erred in failing to address *other* alleged procedural irregularities in the sale of the restaurant. Because of the interlocutory nature of the court's decision, however, the Estate is free to renew its contentions in the district court and again on appeal if necessary. Further review of this interlocutory decision is therefore not warranted.

[1] This "improper delivery"—by mail instead of by personal service (see 26 U.S.C. 6335(a))—did not prejudice Powelson. Powelson received actual notice of the sale approximately one month before it occurred (Pet. App. B6, B12-B14). He was in attendance at the opening of the bids (*id.* at B6, B14). Moreover, the sale produced a surplus for the Estate and Powelson of almost $100,000.

[2] As the court of appeals noted (Pet. App. A8), the government contends that petitioners are not entitled to a refund in any event because it is undisputed that there was no overpayment of taxes. See *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932). The court could have, and, we believe, should have, affirmed on this basis. Instead, it chose to remand for the district court to consider this issue.

b. Petitioners also contend (Pet. 16-19) that the court of appeals erred in failing to address the Estate's quiet title and declaratory judgment claims. The final amended complaint filed by the Estate, however, contained only a claim for refund. The final amended complaint superseded the prior complaints and made them of no effect. 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1476, at 556-557 (2d ed. 1990). An amended complaint acts as a waiver of any claims made in an earlier pleading that are not incorporated into it. See, *e.g.*, *King* v. *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *London* v. *Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *Loux* v. *Rhay*, 375 F.2d 55 (9th Cir. 1967). The court of appeals correctly limited its discussion to the Estate's refund claim, which was the only claim presented in the final amended complaint (Pet. App. D1-D11).[3]

c. Petitioners contend (Pet. 13-16) that the court of appeals erred in not addressing the individual claims of Powelson in the First Suit. But Powelson

[3] Other courts of appeals have held that the filing of an amended complaint does not waive the plaintiff's right to contest on appeal the dismissal of prior claims. See, *e.g.*, *Davis* v. *TXO Production Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991); *Bloomer Shippers Ass'n* v. *Illinois Central Gulf R.R.*, 655 F.2d 772, 776 (7th Cir. 1981). But petitioners have not raised this issue as a question for this Court's review. Petitioners also did not raise this issue below, despite filing three petitions for rehearing in which they specifically argued that the court erred in failing to address other issues. Moreover, the court of appeals did not specifically address the waiver issue in its opinion. In any event, because of the interlocutory posture of this case, further review at this time is not warranted.

failed to take an appeal in that capacity. As petitioners recognize (Pet. 22), Powelson was acting in these cases in two separate legal capacities—as personal representative of the Estate and as an individual distributee. The caption of the notice of appeal listed as plaintiff "Gordon E. Powelson, Personal Representative of the Estate of Clydena M. Gross, Deceased." The body of the notice stated that "Notice is hereby given that Gordon E. Powelson, Personal Representative of the Estate of Clydena M. Gross, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit" (C.A. App. 1). Since Powelson, acting as an individual, was not listed in the notice of appeal, and since no indication was given in the notice that Powelson was taking an appeal in his indivdual capacity, he was not a party to the appeal. See Fed. R. App. P. 3(c); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) ("The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal.").

2. *The Second Suit By Powelson And Chicago Title*

a. The decision of the court of appeals affirming the dismissal of the Second Suit brought by Powelson and Chicago Title (for a declaratory judgment and to quiet title) is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

The court of appeals correctly held (Pet. App. A7) that petitioners are precluded from obtaining declaratory relief in this case by the "tax exception" to the Declaratory Judgment Act, 28 U.S.C. 2201. The

Act specifically excepts controversies "with respect to federal taxes" from the general grant of authority to federal courts to award declaratory relief. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 732 n.7 (1974). This exception applies whether the plaintiff challenges the substance of tax assessments or the procedural validity of tax collection activities. See *Hughes* v. *United States*, 953 F.2d 531, 536-537 (9th Cir. 1992); *McCarty* v. *United States*, 929 F.2d 1085, 1088 (5th Cir. 1991).[4]

The court of appeals also correctly held (Pet. App. A7-A8) that 28 U.S.C. 2410 does not waive the government's sovereign immunity from suit in this case. Section 2410 waives sovereign immunity when the plaintiff seeks to "quiet title to * * * real or personal property on which the United States has or claims a mortgage or other lien." *Ibid.* The courts have consistently held that Section 2410 does not apply when the government no longer claims a lien on the property at the time the suit is brought. See *Hughes* v. *United States*, 953 F.2d at 538 (no waiver because the government had sold property prior to commencement of action); *Erickson* v. *United States*, 780 F. Supp. 733, 736-737 (W.D. Wash. 1990) (same). See also *Cummings* v. *United States*, 648 F.2d 289,

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[4] The two district court decisions that petitioners cite (Pet. 14-15) are not to the contrary. *Little River Farms, Inc.* v. *United States*, 328 F. Supp. 476 (N.D. Ga. 1971), does not even discuss the Declaratory Judgment Act. *Rodriguez* v. *United States*, 629 F. Supp. 333, 341-342 (N.D. Ill. 1986), merely holds that the tax exception to the Declaratory Judgment Act does not bar a quiet title suit that is otherwise proper under Section 2410.

292 (5th Cir. 1981) (no waiver because government claimed title interest, not lien interest, in property); *Bertie's Apple Valley Farms* v. *United States*, 476 F.2d 291, 292 (9th Cir. 1973) (same); *Trustees of the Puritan Church* v. *United States*, 294 F.2d 734, 735 (D.C. Cir. 1961) (same). Cf. *Kulawy* v. *United States*, 917 F.2d 729, 733-734 (2d Cir. 1990) (court not divested of jurisdiction by IRS's sale of property after taxpayer filed suit).

Petitioners err in contending (Pet. 20-21) that these consistent rulings conflict with *Aqua Bar & Lounge, Inc.* v. *United States*, 539 F.2d 935 (3d Cir. 1976). In *Aqua Bar & Lounge*, the court noted that the government had previously levied upon and sold the taxpayer's liquor license but the license remained in the taxpayer's name on the records of the Pennsylvania Liquor Control Board at the time of the suit. *Id.* at 937. The court further noted that neither the government nor the purchaser had physical possession of the license, which remained in the hands of the Control Board. On these peculiar facts, the court held that a quiet title suit could proceed under 28 U.S.C. 2410. See 539 F.2d at 937-938. The decision in *Aqua Bar & Lounge* is consistent with the decisions holding that, when a tax sale is not complete at the time suit is commenced, the quiet title action may go forward. See *Goodwin* v. *United States*, 935 F.2d at 1063-1064; *Kulawy* v. *United States*, 917 F.2d at 733-734. In the present case, by contrast, the sale was completed *before* Powelson and Chicago Title filed suit. The decision in this case thus does not conflict with *Aqua Bar & Lounge*.

b. Petitioners argue (Pet. 19-21) that the court of appeals erred in failing to address their claim that there was a "gap" in the chain of title.[5] Because the court held that the government had not waived its sovereign immunity to suit, the court correctly did not reach the merits of this or any of the other of petitioners' claims. See Pet. App. A8 n.3.

[5] Petitioners' contention (Pet. 19-20) is based on the theory that the government purported to sell only the Estate's interest in the Organ Grinder restaurant but that the Estate's interest had previously been transferred to Powelson. That contention is incorrect. The government properly sold the interest that the Estate possessed *at the time the tax lien arose*. See 26 U.S.C. 6339(b)(2) (the deed of sale issued by the Commissioner "shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto"); Treas. Reg. § 301.6339-1(b)(2) (the tax-sale deed conveys the interest that taxpayer had in the property "at the time the lien of the United States attached thereto"). See also *Blacklock* v. *United States*, 208 U.S. 75, 89 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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